# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 30, 2007 |
| v | No. 261347<br>Berrien Circuit Court |
| HENRY FUTRELL, JR.,<br><br>Defendant-Appellant. | LC No. 2004-406061-FH |

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant Henry Futrell, Jr., appeals his jury trial convictions for possession with intent to deliver less than 50 grams of heroin, second offense, MCL 333.7401(2)(a)(iv), MCL 333.7413(2); and maintaining a drug house, second offense, MCL 333.7405(d); MCL 333.7413(2). He was sentenced to 23 to 480 months' imprisonment for possession with intent to deliver, and 23 to 48 months' imprisonment for maintaining a drug house. We affirm.

On October 27, 2004, police officers executed a search warrant at 395 Morton Street in Benton Harbor, Michigan. Three people were apprehended by police during the execution of the warrant: Antonio Taylor, Justin Jenkins, and defendant. When the police arrived at the house, Jenkins and defendant attempted to flee. Defendant was subsequently searched and found to possess a Nokia 3595 cellular telephone, a set of keys, betting slips, lottery tickets, a "grinder," a key that opened the front door of 395 Morton Street, and $277 in cash. The house itself was sparse, with little furniture, no running water, and no electricity. However, the police found 2.186 grams of powdered heroin inside and user guides for the type of telephone defendant possessed.

At trial, defendant claimed that he traveled to 395 Morton Street on October 27 to talk to a woman named "Lisa" about purchasing a dog. Defendant claimed that he left the cellular telephone user guides in the house on a previous visit. He also denied owning the house, denied having a right to possess the house, and denied going inside the house on the date the search warrant was executed.

During defendant's closing argument, defendant's attorney stated:

> Mr. Jenkins testified that he was there, that [he] was handed this stuff by Lisa, and that he took it inside and put it on the table. And he said Mr. Futrell

> never came in. The prosecution has an opportunity to bring other people in and say, oh, no, no, no, no, no, you told us something else; oh, no, no, no, no, I know something different. [Defendant] testified, testified that he was outside, testified he never went into the house. The prosecution has an opportunity to present addition evidence [sic]. Where is that evidence? Where is someone who came in to court after [Jenkins and defendant] testified and said, no, they're not telling us the truth?

The prosecutor objected, stating:

> Your honor, I object just for the reason that I was unable, as [the defendant's attorney] is aware, Antonio Taylor, the third person, has a right against self incrimination and I can't call him.

The defendant's attorney stated, "[t]hat has nothing to do with what I just said." The trial court responded by stating:

> Well, the jury is advised that Mr. Taylor, who the testimony was was the third person there, does have the right to remain silent and the People could not force him to come here to testify in this case.

In rebuttal, the prosecutor reiterated that she could not call Taylor as a witness.

Defendant argues on appeal that the statements regarding codefendant Jenkins' testimonial privilege violated his Sixth Amendment right to confrontation, and constituted prosecutorial misconduct. This issue is not properly preserved for appeal. Defendant did not respond to the prosecutor's allegedly impermissible remarks with a specific objection that the prosecutor made an improper reference to a codefendant's right to self-incrimination or violated defendant's Confrontation Clause rights. To preserve claims of prosecutorial misconduct for review, defendant must timely and specifically object. *People v Ackerman,* 257 Mich App 434, 448; 669 NW2d 818 (2003). Our review is for plain error. *People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001).

We reject defendant's argument that his confrontation rights were violated by the prosecution's statements during closing arguments.

Although a confrontation clause issue may arise when a witness asserts the Fifth Amendment, it does not arise where a witness does not give any substantive testimony. *People v Gearns,* 457 Mich 170, 186-187; 577 NW2d 422 (1998), overruled on other grounds *People v Lukity,* 460 Mich 484, 494; 596 NW2d 607 (1999). Implicit in federal confrontation clause jurisprudence is the notion that a witness must put forth some testimony before the defendant's right of confrontation can be invoked. A defendant does not have a right to confront a witness who does not provide any substantive evidence at trial. *Gearns, supra* at 187. A mere inference does not give rise to a confrontation clause violation. *Id.* In the matter before this Court, the prosecutor referred to the fact that Antonio Taylor, one of defendant's codefendants, could not be compelled to testify by the prosecution. Taylor did not actually testify, and therefore did not provide any substantive testimony that was harmful to defendant. Because the prosecutor only

referred to a witness who never testified in the case, defendant's right to confront the witnesses against him was not violated by the prosecutor's remarks during closing argument.

To the extent that defendant's argument implicates the issue of prosecutorial misconduct, we find no plain error necessitating reversal. To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error must have occurred; (2) the error must be plain; and (3) the error must have affected defendant's substantial rights, which generally requires defendant to show that the error affected the outcome of lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763, 774. Further, no error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect. *Watson*, *supra* at 586; *Ackerman*, *supra at* 448-449.

We find that defendant cannot show that the challenged conduct, even if improper, affected the trial or undermined the fairness, integrity, or public perception of judicial proceedings. There was significant evidence from which a jury could have found defendant guilty of maintaining a drug house and possessing less than 50 grams of heroin with the intent to deliver it. In addition, the trial court later instructed the jury that the arguments and statements of the lawyers were not evidence, which precluded consideration of the challenged statements as evidence. Jurors are presumed to follow a court's instructions, and thus, the prejudicial effect of the prosecutor's reference to Taylor's testimonial privilege was cured. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant also argues on appeal that, if his counsel invited the comment about Jenkins' testimonial privilege, he was denied the effective assistance of counsel. The trial court did not conduct a *Ginther*[1] hearing, so review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Ineffective assistance of counsel is a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Before trial, defendant opposed the prosecutor's motion to preclude reference to the guilty pleas of codefendants Taylor and Jenkins. Defendant's trial counsel argued that the convictions of the codefendants was relevant because they would show the jury that two people were already convicted for possessing the same heroin that defendant was charged with possessing. The challenged comments of defense counsel, which invited the prosecutor's

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

reference to Taylor's right against self-incrimination, was consistent with the defense theory that codefendant Jenkins had the heroin and got it from Lisa, and that the prosecution had not shown otherwise. While defense counsel's argument invited the prosecutor's references to self-incrimination, the underlying strategy was not unsound. This Court will not substitute its judgment for that of counsel on matters of trial strategy or assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001), lv den 466 Mich 853 (2002).

Further, defendant cannot demonstrate the requisite prejudice to require reversal, even if this court found counsel's performance objectively unreasonable. There was ample evidence on which the jury based its guilty verdict. In addition, the trial court instructed the jury that it was only allowed to base its verdict on evidence that was admitted at trial and that the lawyers' statements and arguments were not evidence. Jurors are presumed to follow a court's instructions. *Matuszak*, *supra* at 58. Based on the circumstances, defendant cannot show that, but for his attorney's error, the result of defendant's trial would have been different. At best, the jury was made aware of an inference that codefendant Taylor's testimony would have been incriminating. This inference, which the jury was instructed was not evidence, did not change the outcome of the case. Reversal is not required.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Helene N. White